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Supreme Court of the United States

OCTOBER TERM, 1952

ADELE WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY MOSER,
Counsel for Petitioner.

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OCTOBER TERM, 1952

ADELE WEISS,
Petitioner,
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THE UNITED STATES OF AMERICA,
Respondent.

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above entitled case on October 29, 1952.

Opinions Below

The opinion of the District Court (R. 34-38) is reported in 103 F. Supp. 470. The memorandum opinion of the Court of Appeals (R. 41) was not reported when this petition was filed.

Jurisdiction

The judgment of the Court of Appeals was entered on October 29, 1952 (R. 43). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Statement and Questions Presented

The veteran herein is one of a class of veterans who, while in service, took out two certificates of level premium term National Service Life Insurance. The veteran died on August 27, 1948. The defendant disclaimed liability stating that the policies had lapsed on March 31, 1947 (R. 8).

When plaintiff brought the first action on March 2, 1949, she proceeded under the mistake of fact that the policies

had lapsed (Comp. par. 9, R. 21), and alleged, as the Court below stated in *Weiss* v. *U. S.*, 187 F. 2d 610, 611:

> "* * * for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums * * * sufficient and effective for the purpose * * *."

Plaintiff's complaint was dismissed for failure to state a claim without prejudice to plaintiff "* * * showing a different application or availability of such portion of the Fund to the payment of unpaid premiums * * *" (92 F. Supp. 322, 325); reargument was denied; motion to amend denied and a motion to compel the defendant to sell or supply plaintiff with all regulations was also denied (92 F. Supp. 322, 325; aff'd 187 F. 2d 610; cert. den. 342 U. S. 820; rehearing denied 342 U. S. 874; second rehearing den. 72 S. Ct. 357).

Subsequent to the commencement of the first action the defendant made public for the first time certain facts which indicated that the aforesaid "* * * insurance reserve based upon unearned premiums * * *" had been charged with the veteran's contributive and/or distributive share of the liabilities that were charged against the N.S.L.I. Fund until the death of these veterans (Comp. pars. 17, 18, R. 22, 23) with the result that this class of veterans paid the same contribution until the dates of their death as all the other policyholders of the same age, class and equal expectation of life (Comp. par. 23, R. 23, 10), and paid all the premiums required pursuant to the terms of a contract issued on a mutual basis (Comp. par. 24, R. 24). That the aforesaid reserve was more than sufficient to pay the total gross flexible premiums until the veteran's death (Comp. pars. 12, 13, R. 21, 22).

On November 26, 1951, plaintiff brought the instant action for relief pursuant to Rule 60b[1] and pursuant to

[1] Federal Rule 60b; Relief from Civil Judgments, 61 Yale Law Journal 76, 80.

Rule 18 for the proceeds of these certificates. A motion to direct defendant to answer requests for admissions and an interrogatory was made returnable on March 5, 1952 (R. 18). Defendant thereafter moved for summary judgment returnable the same day (R. 5). Plaintiff, in her affidavit in opposition, incorporated by reference the answers to the requests for admissions and the interrogatory as "* * * facts essential to justify his opposition * * *" Rule 56(f) (R. 8, 13). The District Court granted defendant's motion for summary judgment and thereafter denied the motion to direct the defendant to answer (R. 4, 17). On appeal from these orders the Court below affirmed on the opinion of the District Court (R. 41, 42).

The Court below stated (R. 38):

> "What is important and necessary for the plaintiff to support her claim, as indicated by the Court of Appeals, is to show some statute, or regulatory basis within the framework of the statute, for the right to look to some insurance reserve to remedy the failure to pay required premiums; how or why a reserve was allowed to accumulate by the Government is not material here."

The facts disclosed subsequent to the first action now indicate that unless the provision of Sec. 602(f) of the Act[1] granting "* * * extended values * * *" was applicable to the aforesaid reserve, these veterans would be compelled to adhere to their obligation of Sec. 605(a) of the Act[2] which provided that their premiums, while part of the Fund until dividends were declared "* * * shall be available for the payment of liabilities under such insurance * * *" and thus pay their contributive share of the liabilities that were charged against the Fund and pay the same contribution that was charged to all the other policyholders of the same age, class and equal expecta-

[1] Appendix, pp. 10, 11, Petition, p. 6.

[2] Petition, p. 6.

tion of life until the dates of their death, and/or until dividends were declared without receiving anything in return for their contribution (R. 9, 10).

The Questions Therefore Presented Are:

(1) Should the Act be so construed as to take property without due process when it can be construed in a constitutional manner by granting the provision of Sec. 602(f) of the Act as to "* * * extended values * * *" to these policyholders?

(2) Where the provisions of Sec. 602(f) and 605(a) of the Act and the new facts conclusively indicate the inapplicability of the regulations which provide that dividends shall be paid in cash with the result that the defendant has no defense to the instant claim pursuant to Rule 60(b), may the defendant now invoke the former judgment as an escape from facing squarely the real questions herein?

Specification of Errors to be Urged:

(1) In holding that the certificates had lapsed.

(2) In affirming the order granting defendant's motion for summary judgment, the order denying a motion to strike out the defense of res judicata, and the order denying plaintiff's motion to direct the defendant to answer requests for admissions and an interrogatory when these answers were incorporated in the affidavit in opposition as "* * * facts essential to justify his opposition * * *" pursuant to Rule 56(f) (R. 8, 11, 13).

Reasons for Granting the Writ

The present facts indicate that there was a mutual mistake of fact when this class of veterans were advised that their policies had lapsed.

In the former case the Court below stated (187 F. 2d 610, 612):

> "* * * she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the * * * Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured * * * there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible * * *."

The present facts indicate that this money had "* * * been used to keep the main policies alive * * *."

The Court below stated (R. 36, 37):

> "Plaintiff's pending complaint alleges that the declaration of dividends in January, 1950, including dividends upon premiums paid to March, 1947, by Eugene Morse, indicates the existence of a reserve prior to the declaration; that this reserve was 'charged toward the payment of liabilities' under the National Service Life Insurance Fund; that the credits due to Eugene Morse out of the premiums he had paid prior to March 31, 1947, were used by the defendant in paying his 'distributive and/or contributive share' of the liabilities charged to the Fund; that by reason of such credit being subject to the 'risk and/or liability' of the Fund, a 'vested' right was created which became fixed upon the veteran's death; and, therefore, that there was a 'vested property right' in the veteran to receive the full value of the policies, since the credits to which he was entitled exceeded the amount of the premiums he was required to pay between March 31, 1947 and his death on August 27, 1948. It is also alleged that the attempt to return part of the excess payment of premiums at a subsequent date in the form of dividends could not take away this 'vested' right."

Statutes Involved

Sec. 605(a) of the Act, 38 U. S. C. A., Sec. 805(a), provides:

> "There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator."

Sec. 602(f) of the Act, 38 U. S. C. A. 802(f)[1] states in part:

> "Provisions for cash, loan, paid up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator."

This is an insurance contract, not a banking contract. The Government, having accepted the veteran's premiums for insurance equal to the face value of the policies, became obligated both by contract and pursuant to Sec. 605(a) of the Act to give these veterans such insurance while their premiums remained in their status and were part of the Fund until dividends were declared. These veterans, having died before dividends were declared and while their premiums were still in the status of premiums and still in the Fund, the rights of the parties became fixed and vested. (*Jones* v. *Union Central Life Ins. Co.*, 265 App. Div. 388, aff'd 290 N. Y. 883; *American National Bank and*

[1] Appendix, pp. 10, 11.

Trust Co. of Chicago v. *United States,* 7th Cir. 159 F. 2d 188, 192). This mutual obligation that the premiums while in the Fund and until dividends were declared " * * * shall be available for the payment of liabilities under such insurance, * * * " (Sec. 605(a)) became a vested property right. Once dividends were declared, this reserve was withdrawn from the Fund and allocated to dividends. But until dividends were declared this mutual obligation continued. Had dividends been declared before the death of these veterans, they would not have been compelled to pay their contributive share of the liabilities that were charged against the Fund until their death. The defendant's very act in applying the provision of Sec. 605(a) of the Act to this reserve to pay the veterans' contributive share of the liabilities that were charged against the Fund until dividends were declared " * * * recognized that the policyholder had the power to prepay it to the extent of the money in its possession" (Comp. par. 22, R. 23).

The present facts indicate that the risk to pay for the liabilities that were charged against the Fund is now placed upon these veterans who had money on deposit to their credit in the Fund without any risk on the part of the Government. The only way that there can be a mutuality of risk and for the Administrator to avoid the taking of property without due process would be to grant the provision of Sec. 602(f) of the Act as to " * * * extended values * * * " to these policyholders.

The foregoing explains why Congress did not limit the applicability of this provision to any particular plans of insurance.

Applying the definition of insurance as "Risk-distribution" (*Helvering* v. *LeGierse,* 312 U. S. 531, 539) and "Equality of Risk", these veterans were never required to pay a higher premium than their contributive share of the liabilities that were charged against the Fund until their death. Thus, if the mortality table used or the plan (converted policies) require higher premiums, the unearned premiums and the reserve is proportionately in-

creased but the veteran is never liable for more than his contributive share.

Two of the regulations sustained as a defense in the former action (187 F. 2d 610, 612; 38 C. F. R., 1949 Ed. Sec. 826[1] and 38 C. F. R., 1947, Supp. 10, 3426)[2] now support plaintiff's claim as they indicate a "* * * regulatory basis within the framework of the statute, for the right to look to some insurance reserve to remedy the failure to pay required premiums; * * *"[3] in that they both provide "* * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * *" and as plaintiff does not predicate her claim on dividends the regulations which require that dividends shall be paid in cash do not apply to the present facts; further, Public Law 36 of the 82nd Congress, effective January 1, 1952, erased the aforesaid regulations which provided that dividends shall be paid in cash without the written consent of the veteran.[4]

The case of *Parker* v. *Veterans Administration of the United States*, 5 Cir.; 193 F. 2d 149, creates a conflict in fact and reasoning with the opinion of the Court below in the instant case. In the *Parker* case the Court stated (150):

> "* * * it was contended that the premium paid by her son constituted an 'overcharge' in the amount of the dividend accruing to the insured, * * *."
>
> * * * * * *
>
> "* * * Upon the trial the judge concluded as a matter of law that there was no overcharge, * * *. The appellant here insists that this is wrong, and that since there was owed the soldier an overcharge greater than the amount needed to pay the premiums the indebtedness represented service pay due and should be applied to accomplish such payment. * * * The argument of the

[1] Appendix, p. 12.

[2] Appendix, pp. 12, 13.

[3] Opinion of Court below (R. 38).

[4] Appendix, p. 11.

appellant overlooks the point that the premium paid by the deduction from the service pay was the proper and regular charge for the premium due upon the insurance. When so employed the money no longer possessed any element of service pay, but instead was the payment of insurance premiums by the insured. Consequently, the rights of the beneficiary must be determined as a matter of insurance * * *."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

APPENDIX

Sec. 602(f) (38 U. S. C. A. 802(f))

Act of Oct. 8, 1940, as amended by sec. 3, Public Law 589, 79th Cong. Aug. 1, 1946, by sec. 2, Public Law 5, 80th Cong., Feb. 21, 1947, and by Public Law 838, 80th Cong., June 29, 1948.

(f) Such insurance may be issued on the following plans: Five-year level premium term,[16] ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled. All level premium term policies, except as provided below, shall cease and terminate at the expiration of the term period: *Provided,* That at the expiration of the term period any national service life insurance policy which was issued on a five-year level premium term plan before January 1, 1948, and which has not been exchanged or converted to a permanent plan of insurance, may be renewed as level premium term insurance for an additional period of five years at the premium rate for the then attained age without medical examination, provided, the required premiums are tendered prior to the expiration of the first term period: *Provided further,* That in any case in which the insured is shown by evidence satisfactory to the Administrator to be totally disabled at the expira-

[16] The 5-year term policies issued prior to December 31, 1945, were extended for an additional period of 3 years. (See appendix, Public Law 118, 79th Cong.)

tion of the level premium term period of his insurance under conditions which would entitle him to continued insurance protection but for such expiration, such insurance, if subject to renewal under this provision, shall be automatically renewed for an additional period of five years at the premium rate for the then attained age, unless the insured has elected insurance on some other available plan. Provision for cash, loan, paid-up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

Public Law 36—82d Congress, Chapter 94—1st Session
H. R. 321

AN ACT

To provide that on and after January 1, 1952, dividends on national service life insurance shall be applied in payment of premiums unless the insured has requested payment of dividends in cash.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 602(f) of the National Service Life Insurance Act of 1940, as amended, is hereby amended by substituting a colon for the period at the end thereof and adding the following: "*Provided further,* That until and unless the Veterans' Administration has received from the insured a request in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952."

Approved May 18, 1951.

38 C. F. R. 8.26 F. R. Sept. 16, 1948, p. 5399, Vol. 13, No. 181

Sec. 8.26 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' affairs. Any such dividend shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid up insurance as provided in Sections 8.29(a) and 8.30 respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash to the person currently entitled to receive payments under the policy.

F. R. April 1, 1947, page 2129, Vol. 12, No. 64

Sec. 10.3426 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force

on a basis other than extended term insurance or level premium term insurance. Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds.

(Secs. 601-618, 54 Stat. 1008-1014; 38 U. S. C. 801-818.)